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76-183

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5193

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare; ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services, and JOSEPH D'ELIA, individually and as Commissioner of the Nassau County Department of Social Services,
Appellants-Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated,
Appellants-Intervenors,

DANIELLE and ERIC GANDY, RAFAEL SERRANO, and CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE on behalf of themselves and all others similarly situated,
Appellants-Plaintiffs,

against

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, MADELINE SMITH, RALPH and CHRISTIANE E. GOLDBERG, and GEORGE and DOROTHY LHOTAN, on behalf of themselves and all others similarly situated, all others similarly situated,
Appellees.

APPELLANTS' JOINT APPENDIX TO JURISDICTIONAL STATEMENTS

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Appendix "A", Opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO; and GEORGE and DOROTHY LHOTAN, on their own behalf and as next friend of CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare; ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services, and JOSEPH D'ELIA, individually and as Commissioner of the Nassau County Department of Social Services,

Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situtated,

Intervenors-Defendants.

Before LUMBARD, Circuit Judge, and POLLACK and CARTER, District Judges.

Appendix "A", Opinion.

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Appendix "A", Opinion.

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LUMBARD, Circuit Judge:

The Organization of Foster Families for Equality and Reform (OFFER) and three individual foster families bring this class action for injunctive and declaratory relief seeking the invalidation of New York Social Services Law §§ 383(2) and 400, and N.Y.C.R.R. § 450.14. Plaintiffs allege in their complaint that the above provisions violate both the Equal Protection and Due Process Clauses of the Fourteenth Amendment in that they authorize the state to remove foster children from their foster homes without affording a prior hearing to either foster child or foster parents.[1]

Plaintiff foster parents initially sought to represent, as "next friend," the interests of their foster children as well. However, to forestall any possible conflict of interest, Judge Carter appointed Helen Buttenwieser as independent counsel for the foster children, advising the parties of his action by letter dated October 29, 1974. In that capacity, she has consistently argued that the foster parents

have no constitutionally cognizable interest independent of those of the foster children and that an adversary hearing is not the proper forum to determine the "best interest of the child."[2] The defendants—government officials at the state and local level and the Executive Director of the Catholic Guardian Society—are responsible for administering the foster care system within their respective jurisdictions. In addition, five biological mothers of children currently in foster care were granted leave to intervene in these proceedings on behalf of themselves and all others similarly situated.[2a]

The present statutory scheme, applicable throughout most of the state,[3] provides that the local public welfare department or an authorized private agency acting on its behalf[4] may, in its discretion and on 10 days notice, order the removal of any foster child from the foster home in which he or she has been placed. Social Services Law §§ 383(2) and 400. After having been informed of the impending removal in a printed notice which contains no space for any detailed elucidation of the reasons for that removal, the foster parents may request a conference with a "public official" of the local social services department at which they have an opportunity to express their dissatisfaction with the agency's decision but no formal manner is provided whereby they may contest it. N.Y.C.R.R. § 450.14.

Although the foster parents may be accompanied to the conference by "a representative," they may not present or cross-examine witnesses, nor may they inspect the agency files even if records contained therein formed the predicate for the administrative decision. Yet, despite these handicaps, the burden is upon the foster parents to submit "reasons why the child should not be removed." The agency, by contrast, has no countervailing obligation to provide an articulated rationale for removing the child. N.Y.C.R.R.

§ 450.14. There is evidence in the record which indicates that rarely, if ever, do these pre-removal conferences result in the reversal of the initial decision. Post-removal, the foster parents are entitled to a "fair hearing," Social Services Law § 400(2), and then, if still "aggrieved" by the agency action, they may obtain judicial review.

Plaintiffs contend that these procedures deprive them of "liberty and property" interests without due process of law. The specific liberty interest which they assert is the right to familial privacy. E.g. Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Griswold v. Connecticut, 381 U.S. 479 (1965). Cognizant that each of the Supreme Court decisions in this area dealt with a more traditional, biological family, plaintiffs rely on several recent studies which functionally define the family as a psychological rather than a biological unit. Goldstein, Freud and Solnit, BEYOND THE BEST INTERESTS OF THE CHILD. Plaintiffs insist that after one year of foster care, emotional attachments have formed which the state should not be at liberty arbitrarily to upset. Plaintiffs further assert that the statistical evidence as to the length of the average child's stay in foster care creates an "informal tenure" system raising legitimate expectations that their role as foster parents will not be abruptly terminated.[5] Perry v. Sinderman, 408 U.S. 593 (1972). To illustrate the arbitrary manner in which they claim the outlined statutory provisions can operate, plaintiffs offer the example of their own personal involvement with the foster care system.

Madeline Smith is a 53 year old widow who lives in East Elmhurst, New York. She became an approved foster parent[6] under the supervision of the Catholic Guardian Society of New York in 1969. On February 1, 1970, she took Eric and Danielle Gandy into her home as foster children. At the time, Eric was four and Danielle two. Plain-

tiffs claim, and defendants do not dispute, that Danielle has never seen her natural mother and Eric no longer remembers her. Both children, who are legally free for adoption consider Mrs. Smith to be their mother.

Nevertheless, on March 29, 1974, Mrs. Smith was notified by letter from the Catholic Guardian Society that Eric and Danielle were to be removed from her care because "it is now in their best interests to leave your home." The agency's concern, not shared by Mrs. Smith, was that her arthritis would interfere with her undeniably well-meaning efforts to supervise the increasingly active behavior of Eric and Danielle. Although Mrs. Smith signed a waiver of her right to a pre-removal conference, she made it abundantly plain that she had no intention of surrendering the children. When told that they would be forcibly taken from her, she obtained a lawyer and began the instant litigation. To date, the children remain in Mrs. Smith's home—originally the result of a temporary restraining order, later the product of a voluntary stipulation among the parties.

Plaintiffs Mr. and Mrs. Lhotan are similarly authorized foster parents; they, however, are under the supervision of the Nassau County Department of Social Services Children's Bureau. On September 4, 1970, Cheryl and Patricia Wallace were placed in the Lhotan home; two years later they were joined by their younger sisters, Cynthia and Cathleen. By all accounts, most notably that of the children, the reunion was a happy one for all concerned. Indeed, when Mrs. Lhotan was told on June 26, 1974 that the children were to be removed from her home ten days hence, the only reason given was that the four girls were growing too attached to their foster family. Mrs. Lhotan was informed that Cheryl and Patricia were to be returned to their biological mother while Cynthia and Cathleen were to be transferred to another foster home.

However, on July 8, 1974, in response to a request by the Lhotans, Judge Carter issued a temporary restraining order barring the removal of the children which had been scheduled for the next day. That order remained in effect until March 3, 1975, when it was dissolved by this court. Meanwhile, Mrs. Wallace, the biological mother, had begun habeas corpus proceedings in the state court to secure the return of her children. On February 23, 1976, the Appellate Division for the Second Department upheld a lower court ruling mandating immediate implementation of the plan devised by the Nassau County Department of Social Services Children's Bureau. The time for appeal of that decision has not yet passed.

Mr. and Mrs. Ralph Goldberg, the final set of plaintiff foster parents, face a less imminent threat. They have, since July 1969, taken care of Rafael Serrano, then six years old. Prior to his placement in the Goldberg home, Rafael had lived with a succession of foster families after having been abused by his natural parents during the time that he remained with them. Although the Goldbergs have been repeatedly told that they have done an excellent job in providing a healthy environment in which Rafael might grow and develop, they now fear, on the basis of various unofficial statements, that the Bureau of Child Welfare intends to remove Rafael and place him with his aunt. While the Goldbergs have yet to be officially notified of any such plan, they join in this action to insure that they will be entitled to a pre-removal hearing if and when such a decision is made.

Neither defendants nor intervenors dispute the strength of the emotional ties binding plaintiffs and their foster children nor the loss that will be felt if those ties are severed. Both defendants and intervenors insist, however, that the question now before us is and must be more narrowly focused. We agree. As a statutorily ordained court

we must limit our inquiry to a determination of whether plaintiffs have established a deprivation of life, liberty or property sufficient to invoke the protection of the Due Process Clause.

We find no merit in plaintiffs' argument that the realities of the foster care system, as presently administered in New York State, justify their expectation that their role as foster parents will not be abruptly and summarily terminated. See Board of Regents v. Roth, 408 U.S. 564 (1972). The most obvious and formidable obstacle to plaintiffs' contention is the agreement that each of them signed upon assuming responsibility for their respective foster children. The contract employed by the Catholic Guardian Society, typical of those used throughout the state, reserves to the agency the right to recall the child "upon request, realizing that such request will only be made for good reason." While such a provision is not dispositive, Perry v. Sinderman, 408 U.S. 593 (1972), the discretionary authority which it vests in the agency is on its face incompatible with plaintiffs' claim of legal entitlement. We are unpersuaded by plaintiffs' efforts to equate an open-ended relationship with one of indefinite duration. Nor does evidence showing that the average child placed in foster care remains within the system for approximately 4½ years[7] support the plaintiffs' position. Cf. Perry v. Sinderman, supra.

We find considerably more difficult plaintiffs' assertion that the foster home is entitled to the same constitutional deference as that long granted to the more traditional biological family.[8] Plaintiffs base their contention upon several recent studies which conclude that the "family" can best be conceived as a psychological entity, uniquely characterized by the emotional interdependence of each of its members. E.g. Goldstein, Freud and Solnit, BEYOND THE BEST INTERESTS OF THE CHILD. Plaintiffs argue that

it is this interdependence, born out of daily and intimate contact, which best explains the family's pre-eminent constitutional position. Plaintiff foster parents further insist that their relationship with their foster children fully satisfies this functional definition, although custody of the child is vested in the authorized agency. Social Services Law § 383 (2). They point to decisions such as Stanley v. Illinois, 405 U.S. 645 (1972), which, they claim, indicate the Supreme Court's willingness to look behind legal formalities when inquiring into the existence of a fruitful family life.[9]

While the intervenors and defendants rely on precisely the same Supreme Court opinions, they emphasize that the holding of each was limited by its facts to biological families. Intervenors, in particular, strongly protest any implication that the contractual relationship between foster parent and foster child is, or ever can be, the equivalent of the relationship between a mother and the child to whom she has given birth.[10] Intervenors have introduced affidavits from eminent experts in social work and psychology which attack the validity of the concept of the "psychological family."[11] The intervenors also argue that this court would be ill-advised to create a precedent which might later be applied to other foster families less concerned and well-intentioned than those now before us.

We agree with the parties that this debate as to the definition of the family and its role in society is an interesting and important one. We need not and should not, however, reach out to decide such novel questions when narrower grounds exist to support our decision. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

We believe that the pre-removal procedures presently employed by the state are constitutionally defective. We

hold that before a foster child can be peremptorily transferred from the foster home in which he has been living, be it to another foster home or to the natural parents who initially placed him in foster care, he is entitled to a hearing at which all concerned parties may present any relevant information to the administrative decisionmaker charged with determining the future placement of the child.[11a] While our decision today is perforce limited to the class as defined in Judge Carter's accompanying certification order, namely all children in foster care for one year or longer, we note that similar interests suggest a similar result whenever the child is placed in a foster home for long term care.[12]

The time has long since passed when children were considered mere chattels of the adults with whom they lived. The foster care system itself, initiated in New York in the latter part of the nineteenth century, represented a large step forward from the prior practice of institutionalizing children with the poor and feebleminded or boarding them out as apprentices or indentured servants. In any event, it is by now well-settled that children are "persons" within the meaning of the Fourteenth Amendment whose rights are entitled to protection against state abridgement. In re Gault, 387 U.S. 1 (1967); Tinker v. Des Moines School District, 393 U.S. 503 (1969); Goss v. Lopez, 419 U.S. 565 (1975). Foremost among those rights, as the Supreme Court has repeatedly held, is the right to be heard before being "condemned to suffer grievous loss," Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

The basis of this right is easily understood. A hearing dispels the appearance and minimizes the possibility of arbitrary or misinformed action. Goldberg v. Kelly, 397 U.S. 254, 266 (1970). In cases such as these, the harmful consequences of a precipitous and perhaps improvident

decision to remove a child from his foster family are apparent. Plaintiffs' experts assert that continuity of personal relationships is indispensable to a child's well adjusted development. We do not need to accept that extreme position to recognize, on the basis of our common past, that the already difficult passage from infancy to adolescence and adulthood will be further complicated by the trauma of separation from a familiar environment. This is especially true for children such as these who have already undergone the emotionally scarring experience of being removed from the home of their natural parents.

Intervenors dispute the seriousness of these losses, relying principally on a longitudinal study conducted by Professor David Fanshell of the Columbia University School of Social Work in which he concluded that there was no statistically significant correlation between a child's successful development and the number of times that child was moved within the foster care system. We find significant, however, Prof. Fanshell's further testimony that, "as a professional, [I] would be against the capricious movement of children." The requirement of a hearing is designed to insure no more.

Most specifically, a hearing is not, as intervenors apparently fear, intended in any way to impede the right of biological parents to regain custody of their children. The law in New York is clear: in the absence of abandonment, formal surrender for adoption or demonstrated unfitness, the "primacy of parental rights may not be ignored." People ex rel. Kropp v. Shepsky, 305 N.Y. 465, 469 (1953); see also, Spence-Chapin Adoption Service v. Polk, supra. We do not, by our holding today, disturb that local judgment.[13]

Nonetheless, we are unable to agree with intervenors' contention that a hearing is therefore superfluous when a foster child is to be returned to his biological parents.

Even under such circumstances, a hearing performs the salutary function of providing the agency with an organized forum in which to gather information concerning, inter alia, the frequency with which the biological parent has been visiting his or her child. If the evidence discloses that, despite the diligent efforts of the agency, the biological parent has failed for more than a year to maintain "substantial and continuous contact" with a child in foster care, permanent neglect proceedings may be instituted and the biological parent's presumptive right to custody may be forfeited. Family Court Act § 611, et seq.; In re P., 337 N.Y.S. 2d 203 (Fam. Ct. N.Y.Co. 1972). A fortiori, when the question is whether a foster child is to be moved from one foster home to another, the state in its parens patriae capacity, will be better able to make an informed decision after a hearing at which all relevant information has been presented. The interest of the state, as parens patriae, is therefore compatible with, rather than antagonistic to, the requirement of a hearing. Goldberg v. Kelly, 397 U.S. at 265.

Plainly, the present pre-removal conference is not designed adequately to fulfill this data-gathering function. As outlined earlier, the foster parents are denied any right to present evidence or witnesses, the public official with whom they confer is already acquainted with the agency's version of the background facts, and the foster child whose future is at stake does not participate. Such a scheme fails to satisfy even the most minimal requirements of procedural due process. Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir.), cert. denied, 400 U.S. 853 (1970). We do not understand the defendants seriously to claim otherwise.

Rather, the state argues that any constitutional defect is remedied by the post-removal "fair hearing" provided under N.Y.C.R.R. § 450.14. We disagree. See Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Fuentes v.

Shevin, 407 U.S. 67 (1972). It is, at the least, paradoxical to suggest that a hearing designed to forestall the hasty and ill-advised separation of a foster child from his foster home can occur after that separation has already taken place. We are unpersuaded by defendants' contention that a decision by the hearing examiner to reverse the agency's action and reunite the family effectively restores the status quo. Such a reunion may ameliorate but it cannot eradicate the injury caused by uprooting the child. Indeed, to the degree that implementation of the hearing examiner's decision requires the disruption of arrangements made in the interim, it may further exacerbate the child's sense of loss. It is in the best interests of the child that the risk of such dislocations be avoided or minimized.[13a]

We find equally without merit intervenors' assertion that § 392 of the Social Services Law adequately protects the due process interests of the foster child. Enacted in 1971, § 392 provides for periodic review of the status of each foster child. One and a half years after being placed in foster care, and every two years thereafter, the Family Court is required to conduct a hearing upon notice to the biological parents, foster parents in whose home the child has lived for at least eighteen months, the child care agency to which the child has been surrendered, and "such other persons as the court may, in its discretion, direct." Following the hearing, an order must be entered incorporating one of four stated dispositional alternatives: that the child be continued in foster care, that he be returned to his natural parents, that proceedings be instituted legally to free him for adoption or, if legally free already, that he be placed for adoption with specified individuals.

Intervenors' contend that the above procedure, when coupled with the continued jurisdiction of the Family Court, Social Services Law § 392(10), fully satisfies constitutional requirements. We do not agree. Cf. Boone v.

Wyman, 295 F.Supp. 1143 (S.D.N.Y. 1969), aff'd. 412 F.2d 857 (2d Cir. 1969), cert. denied 396 U.S. 1024 (1970).

First, and most obviously, § 392 offers no comfort whatsoever to the child in foster care for less than eighteen months. Second, intervenors' reasoning appears to rest upon an unjustifiably expansive interpretation of the scope of § 392. In In re W., 35 N.Y.S.2d 245, 248 (Fam. Ct. N.Y. Co. 1974), the court concluded that the power to direct the child to be continued in foster care did not encompass the authority to order that the child be maintained in any specific foster home.

Third, and most fundamentally, intervenors assume an identity of interest between foster parent and foster child which we are unwilling to accept as we have already indicated by the appointment of separate counsel at the outset of this litigation. The continuing jurisdiction of the Family Court constitutes a safeguard against arbitrary state action only if the proposed removal of the foster child is brought to the court's attention. Intervenors posit that the foster parents will perform this function. They may well be correct in the majority of cases. But we decline to rest the rights of the foster children upon the shoulders of foster parents who, however well-meaning, have a personal involvement and perhaps a financial interest[14] which may color their conduct. If a hearing is required, as we hold it is, it is required in all cases and cannot be made to depend upon the initiative of third persons.[15]

A similar flaw taints the amended regulations promulgated by New York City during the pendency of this action. In most other respects, however, New York City's revised procedures represent a significant improvement over the agency conference and post-removal hearing envisaged by N.Y.C.R.R. § 450.14 and already discussed.

As of July 1, 1974, New York City has provided, at the foster parents' request, as a substitute for or supplement

to the agency conference, a pre-removal "independent review" conducted "in accordance with the concepts of due process." Its salient features, as set forth in an internal memorandum of August 5, 1974, are as follows: (1) the review is heard before a supervisory official who has had no previous involvement with the decision to remove the child; (2) both the foster parents and the agency may be represented by counsel and each may present witnesses and evidence; (3) all witnesses must be sworn, unless stipulated otherwise, and all testimony is subject to cross-examination; (4) counsel for the foster parents must be allowed to examine any portion of the agency's files used to support the proposal to removal the child; (5) either a tape recording or stenographic record of the hearing must be kept and made available to the parties at cost; and (6) a written decision, supported by reasons, must be rendered within five days and must include a reminder to the foster parents that they may still request a post-removal hearing under N.Y.C.R.R. § 450.14.

While the amended regulations represent a considerable improvement over previous procedures, we note certain deficiencies still present in New York City's current practices. First, as alluded to above, the "independent review" now afforded by New York City is available only upon the affirmative request of the foster parents. We reiterate that such a restriction is inconsistent with our holding that it is the child's right to avoid arbitrary dislocations which necessitates a hearing. Whatever hearing is provided should be provided as a matter of course.

Second, New York's amended regulations have no applicability whatsover when the child is to be returned to his biological parents. We see no basis for this distinction which, we believe, erroneously confuses the standard by which evidence is to be judged and the process by which it is gathered. No matter where he is to be placed,

a well informed decision cannot but help to promote the child's "best interests," which all parties seek to advance.

Third, it is unnecessary and likely counterproductive to provide duplicate hearings, one pre-removal and a second after the event. We recognize that New York City was operating within the constraint of a statewise regulation, N.Y.C.R.R. § 450.14, which it had no authority to abrogate. We note, however, that the welfare of the child is best served by a speedy and final decision as to his fate.

Fourth, participation in New York City's "independent review" is limited to the foster parents and the agency representative. In order to insure that all relevant information is presented to the hearing examiner, the child and biological parent should be heard as well. Moreover, it may be advisable, under certain circumstances, for the agency to appoint an adult representative better to articulate the interests of the child. In making this determination, the agency should carefully consider the child's age, sophistication and ability effectively to communicate his own true feelings.

It is not, however, necessary that the chosen representative be an attorney. "The insertion of counsel . . . would inevitably give the proceeding a more adversary cast," Wolff v. McDonnell, 418 U.S. 539, 570 (1974), which as Mrs. Buttenwieser points out, might well impede the effort to elicit the sensitive and personal information required. Thus, we do not hold that a trial-type hearing, such as that now provided in New York City, is constitutionally requisite. See Morrissey v. Brewer, 408 U.S. 471 (1972). Indeed, we are reluctant to impose any preordained structure upon the endeavor of trained social workers to evaluate the often ambiguous indices of a child's emotional attachments and psychological development. Rather, we believe the sounder course is to allow

the various defendants—state and local officials—the first opportunity to formulate procedures suitable to their own professional needs and compatible with the principles set forth in this opinion.

In summary, therefore, we conclude that New York Social Services Law §§ 383(2) and 400, and N.Y.C.R.R. § 450.14, as presently operated, unduly infringe the constitutional rights of foster children. Defendants are enjoined from removing any foster children in the certified class from the foster homes in which they have been placed unless and until they grant a pre-removal hearing in accord with the principles set forth above. Of course, our decision today does not in any way limit the authority of the State to act summarily in emergency situations. Family Court Act § 1021.

The court thanks Mrs. Helen L. Buttenwieser for her valuable assistance as assigned counsel.

Order to be taken on submission.

Dated: March 29, 1976.

J. Edward Lumbard
J. EDWARD LUMBARD
United States Circuit Judge

Robert L. Carter
ROBERT L. CARTER
United States District Judge

FOOTNOTES

[1] Pursuant to the provisions of 28 U.S.C. § 2281, this three judge court was convened to consider plaintiffs' non-frivolous constitutional claims.

[2] In recognition of the independent position advanced by Mrs. Buttenwieser, the term "plaintiff" will be used throughout this opinion to refer only to OFFER and the foster parents although the foster children were also named in the complaint.

[2a] In a separate order, filed concurrently with this opinion, Judge Carter has granted the motion of both plaintiffs and intervenors for class certification. The following parties are thus represented in the instant litigation: All foster parents who have had a foster child live with them continuously for over one year; all foster children who have lived continuously with their foster parents for over one year; and all natural parents who have voluntarily placed children in foster care.

[3] As will be discussed more fully below, New York City has revised its procedures during the course of this litigation.

[4] Authorized agency is defined in New York Social Services Law § 371 (10). It includes any local public welfare children's bureau, such as the defendants New York City Bureau of Child Welfare and Nassau County Children's Bureau, and any voluntary child-care agency under the supervision of the New York State Board of Social Welfare, such as the defendant Catholic Guardian Society of New York.

[5] In October 1974, the New York State Department of Social Services prepared Program Analysis Report No. 56, entitled "Time Spent in Care by Children Served in the New York State Foster Care Program 1973." The report calculated that "[t]he median length of stay for dependent and neglected children in foster care at the end of 1973 was 4.38 years," at p. 13. This raw statistic was placed in context by Prof. David Fanshell of the Columbia University School of Social work who testified on the basis of his own longitudinal study that the probability of a foster child being returned to his biological parents declined markedly after the first year in foster care. Professor Fanshell's study, conducted over a five year period, revealed a decline in discharge rate, as follows:

First year	24%
Second year	13%
Third year	8%
Fourth year	9%
Fifth year	7%

[6] Foster parents boarding children in their home must be licensed annually by an authorized agency pursuant to a legislative scheme set out in New York Social Services Law § 375, et seq.

[7] See note 5, supra.

[8] "The Court has frequently emphasized the importance of the family. The right to conceive and to raise one's children have been deemed 'essential,' Meyer v. Nebraska, 262 U.S. 390, 399 (1923), 'basic civil rights of man,' Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and '[r]ights far more precious . . . than property rights.' May v. Anderson, 345 U.S. 528, 533 (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' Prince v. Massachusetts, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, supra, at 399, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra, at 541, and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring)." Stanley v. Illinois, 405 U.S. 645, 651 (1972).

[9] In Stanley, the Supreme Court invalidated a provision of Illinois law which made the children of unwed fathers wards of the State upon the death of the mother. The Court held that, absent a hearing, the state was prohibited from presuming that the father would be an unfit parent merely because he had never married.

[10] The defendant Catholic Guardian Society currently pays foster parents $155 per month for each foster child boarded in their home, in addititon to an allowance for clothing, medical and dental expenses. This amount is typical of that paid throughout the state.

[11] Plaintiffs have introduced affidavits from similarly eminent experts equally fervent in their support of the concept of the "psychological family."

[11a] Judge Pollack concludes his dissenting opinion with the observation that Social Services Law § 383(3) already "embodie[s] through the right of intervention" the requirement that a pre-removal hearing be provided if the foster child has lived with his foster parents for more than two years. This statement is incorrect. An examination of § 383(3) plainly reveals that while it grants to foster parents the right to intervene in any "proceeding"

concerning the custody of foster children who have resided with them for twenty-four months or longer, it does not purport to create any substantive entitlement to a "hearing" or "proceeding" not elsewhere provided. Judge Pollack's contrary interpretation of the statutory language is moreover belied by the current practices of the defendants. Furthermore, the right to intervention granted by § 383(3) extends to the foster parents only and not to the children themselves.

We therefore emphasize once again that, with the exception of the recently amended regulations in effect in New York City, it is presently the law throughout New York State that a pre-removal hearing is unavailable regardless of the duration of the foster relationship being terminated.

[12] Our disposition of this case makes it unnecessary to decide the claim of the foster parents that the challenged statutes and regulations deprive them of the equal protection of the laws.

[13] Accordingly, we see no basis for intervenors' doomsday projection that biological parents who might otherwise entrust their children to the foster care system will be discouraged from doing so, to the detriment of the child, by the decision in this case.

[13a] Nor do we find anything to the contrary in the Supreme Court's recent holding that an evidentiary hearing is not required prior to the termination of disability benefits. Mathews v. Eldridge, 44 U.S.L.W. 4224 (February 24, 1976). Writing for the majority, Justice Powell emphasized the limited and financial nature of the deprivation there suffered by the plaintiff and the necessarily heavy reliance by the agency on medical documentation in reaching its decision. In contrast, the emotional trauma felt by a young child moved from a familiar home is pervasive and potentially devastating. Moreover, in determining whether the best interests of the child would better be served by his removal to another foster family, the social worker must weigh and evaluate a "wide variety of information," much of it subjective and some of it biased. 44 U.S.L.W. at 4232. A hearing provides the procedure for gathering and evaluating such data, thereby minimizing the risk of error.

[14] See note 10, supra.

[15] It is for this reason that we are unable to agree with intervenors' assertion that a constitutionally adequate recourse is provided the foster parents through a petition for habeas corpus or a petition for custody under Family Court Act § 651, even assuming, arguendo, that the above remedies would be available to a foster parent prior to the removal of the foster child.

Appendix "B", Dissenting Opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2010

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO; and GEORGE and DOROTHY LHOTAN, on their own behalf and as next friend of CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare; ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services, and JOSEPH D'ELIA, individually and as Commissioner of the Nassau County Department of Social Services,

Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themseves and all others similarly situated,

Intervenors-Defendants.

Before LUMBARD, Circuit Judge, and POLLACK and CARTER, District Judges.

APPEARANCES:

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AMENDED

POLLACK, District Judge (dissenting): MP

This is a suit seeking declaratory judgment that New York Social Services Law §§ 383(2) and 400 and Title 18, New York Codes, Rules, and Regulations (N.Y.C.R.R.) § 450.14 are unconstitutional on their face and as applied and seeking injunctive relief against their enforcement. The complaint is grounded on allegations that the sections, which prescribe procedures for the separation of foster children from their foster parents, deprive plaintiffs of due process and equal protection in violation of the Fourteenth Amendment. For the reasons shown hereafter the complaint must be dismissed.

The present statutory scheme, applicable throughout most of the state, provides that the local Public Welfare Department or any authorized private agency acting on its behalf may, at any time up to two years after a child has been placed in foster care, in its discretion and on ten days' written notice, order the removal of any foster child from the foster home in which he or she has been placed.

SSL §§ 383(2), (3), 400 (1976 Supp.). Following notice of the impending removal, the foster parents may request a conference with a social services official and are given the reasons for removal and have an opportunity to express their views thereon. The child may not be removed from the foster home until three days after the conference. Written notice of the decision must be sent to the foster parents no later than five days after the conference which must contain advice of their right to appeal to the Department. N.Y.C.R.R. § 450.14(a-e). A decision to remove may be appealed to the Department, by "any person aggrieved", and the Department must review the case, give the appellant an opportunity for a fair hearing and render a decision within thirty days. SSL § 400(2) (1976 Supp.). A foster parent has been held to be an "aggrieved person" and where administrative remedies are finally exhausted, Court review is available by way of an Article 78 proceeding, CPLR 7800 *et seq.*, before the New York Supreme Court. *In re W*, 77 Misc.2d 374, 355 N.Y.S. 2d 245 (Family Ct. N.Y. Co. 1974). Additionally, after 24 months of foster parentage the foster parents are granted the statutory right to "intervene" in any proceeding involving the custody of the child. SSL § 383(3) (1976 Supp.). Habeas corpus review is also presumably available at the instance of either the foster parent or the foster child. N.Y. CPLR §§ 7001 *et seq.*[1]

The foster-parent-plaintiffs contend that these procedures deprive them of "liberty and property" interests without due process of law. The specific liberty interest which they assert is the right to familial privacy.

Plaintiffs insist that *after one year* of foster care, no child should be removed from a foster home without prior notice and an adversary hearing because emotional at-

tachments have formed by that time which the state should not be at liberty arbitrarily to upset.

Plaintiffs-foster-parents initially sought to represent, as "next friend," the interests of their foster children as well. However, to forestall any possible conflict of interest, Judge Carter appointed Helen L. Buttenwieser as independent counsel for the foster children. In that capacity she has consistently argued that the foster parents have no constitutionally cognizable interest independent of those of the foster children and that an adversary hearing is not the proper forum to determine the "best interest of the child."

The plaintiffs-foster parents, in attempting in this action to obtain rights to certain procedures before a child may be removed from their home, no matter what the circumstances of the foster parents' home, are in effect seeking legislative relief.

Since the commencement of this law suit, New York City has revised its removal procedures when the child is to be placed somewhere other than with its own parents. These new procedures grant to foster parents most of the procedural protections requested by plaintiffs in this law suit: a foster parent receives detailed notice of the intent to remove a child, the reasons for the intended removal, and the right to a fair hearing by the City's Department of Social Services. The foster parents have access to Agency reports to be used at the hearing. Foster parents can present and cross-examine witnesses. The Agency determination must be based only on the record; its written decision must be served within five days of the hearing; and the child cannot be moved in the interim. A recording of the hearing is made and is available at cost.

All members of the Court agree that there is no merit in plaintiffs' argument that the realities of the foster care system, as presently administered in New York State,

justify the finding of an expectation akin to a "property interest" that their role as foster parents will not be abruptly and summarily terminated. *See Board of Regents* v. *Roth,* 408 U.S. 564 (1972). Each foster parent signed, upon assuming responsibility for his or her respective foster child, a contract which reserves to the Agency the right to recall the child "upon request, realizing that such request will only be made for good reason.'"[2]

Moreover, plaintiffs' assertion that the foster home is entitled to the same constitutional deference as that long granted to the more traditional biological family because recent studies conclude that the "family" can best be conceived as a psychological entity, presents a novel question and an interesting social debate. The plaintiffs seemingly ask this Court to extend to them the due process protection afforded to the biological father of an illegitimate child in *Stanley* v. *Illinois,* 405 U.S. 645 (1972). Such an extension would adopt a principle that has long been anathema to the State's foster care policies. The psychological parent/child relationship is an amorphus one, not something that can be precisely defined or explained. The New York Courts have virtually unanimously refused the notion of "common law adoption" and have stated that, in absence of a statutory scheme, adoption—that is the means whereby the status or relationship of parent or child is created between persons not so related by nature—is not permitted. *Matter of Malpica-Orsini,* 36 N.Y. 2d 568, 570 (1975); *Landon* v. *Motorola, Inc.,* 38 A.D. 2d 18 (3d Dept. 1971).[3]

Having decided that the foster parents have no entitlement to their foster children, the Court declines to decide the debate surrounding the plaintiffs' requested extension of *Stanley* v. *Illinois, supra;* an extension which would invest plaintiffs with a "liberty" interest either in the children or the relationship itself. Instead of entering that

debate, the Court departs from the better part of plaintiffs' claims, focused as they are on allegations of unconstitutionality from the viewpoint of the foster parents. The Court then rests its decision on a characterization of the foster children's interest that has been denied by the children's representative, Mrs. Buttenwieser. The Court's opinion anticipates a question of constitutional law in advance of the necessity of deciding it. It holds over the objection of the representative of the children in this suit that the foster children have a "liberty" interest in their relationship with the foster parents. The position of the children taken by the Court is espoused only by the foster parents who have no standing to assert the children's interest.[4] No one with standing to claim that the children require the due process protection sought herein is making that claim and, therefore, on well-settled principle it is not necessary or appropriate to reach that issue.

> The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' *Liverpool, N.Y. & P.S.S. Co.* v. *Emigration Commissioners,* 113 U.S. 33, 39; *Abrams* v. *Van Schaick,* 293 U.S. 188; *Wilshire Oil Co.* v. *United States,* 295 U.S. 100.
>
> 'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to the decision of the case.' *Burton* v. *United States,* 196 U.S. 283, 295—*Ashwander* v. *Valley Authority,* 295 U.S. 288, 346-7 (1936) (Brandeis, J. concurring).[5]

On the basis of its resolution of this anticipated question the Court decides that the preremoval procedures presently employed by the State are constitutionally defective in that a child is entitled to a hearing "whenever and as soon as the child has been placed in a foster home for long term care or whenever, for any reason, he has re-

mained in a foster home for a period of one year or more." Pursuing this result which has every earmark of legislative action, the Court rules that "defendants are enjoined from removing any foster children from the foster homes in which they have been placed for long term care or in which they have lived for more than one year unless and until they grant a pre-removal hearing."*

Realizing that it is moving into unchartered seas, the Court states "we are reluctant to impose any pre-ordained structure upon the endeavor of trained social workers to evaluate the often ambiguous indices of a child's emotional attachments and psychological development. Rather, we believe the sounder course is to allow the various defendants—state and local officials—the first opportunity to formulate procedures suitable to their own professional needs and compatible with the principles set forth in this opinion."

This result will undoubtedly come as a surprise, if not a shock, to the parties. No one has contended for the view reached in the Court's opinion, except possibly to touch on the subject matter tangentially. The parties should certainly have been given a hearing (a briefing opportunity) on the point made by the opinion. They should have been alerted to the possibility that the Court might undertake to consider the "unconstitutionality" of the present procedures from the viewpoint of the foster children whose representative was not asserting any such contention.

If the Court must reach the interest of the children, it must face a situation in which at every step in the foster care system (whether before or after the 24 month period) the child is represented only by the State or by the foster parents. He receives no notice and has no independent

* The Court's draft opinion was as quoted above. It has since limited its holding to apply to only those foster children who have resided with one set of foster parents for at least a year. The dissent is nonetheless the same.

representative at any stage; in short he has no independent role. Therefore, if the question were properly presented, the Court would have to decide whether or not the State, in its *parens patriae* capacity, acts as a sufficient representative for the child and whether or not the Due Process Clause mandates an adversarial hearing for foster children.

Since an independent representative for the child will inevitably be required, the Court has imposed on the delicate system of foster care an inapposite model for the application of the Due Process Clause; a model which requires the balancing of the individual's apparent need for procedural safeguards and the State's apparent need for summary action.[6]

The very structure of the State's foster care system belies the applicability of this model. In a system that at least purports (and the evidence herein shows that it actually does) represent "the best interests of the child" there can be no such facile distinction between the interest of the child, on the one hand, and that of the State, on the other. Unlike the traditional context in which the Due Process Clause has been litigated, there is no necessary opposition between the child and the State here. The State's professional social workers should not so easily be rejected as adequate representatives for foster children (if in this context the Due Process Clause requires strict "representation" at all). Their representation of those children has simply not, on the hearing of this case, been shown to be so inadequate as to require the introduction of a third party to represent the child.

The interests involved in this system of child care are too sensitive, too inchoate, to fit this old due process model; and there seems little doubt that this case presents a striking example of the need for flexibility in the application of the Due Process Clause.[7] Neither the Court's adherence

to the old Due Process approach by requiring an independent representative, nor its refusal to provide further guidelines for the type of hearing it envisions taps the potential for such flexibility.

If the Court has, in fact, improperly required a third party to represent the child, then the remainder of its analysis can only be described as legislation. In holding that the child's interest requires that the foster parents have a formal voice in any decision to remove the child after a year of foster parentage or whenever the child is placed with them for "long term care," the Court first undertakes to express a social policy preference for a one year rather than the present statutory two year period, and then hedges by promulgating a vague standard (as yet undefined in this system) apparently meant to test foster parent-child relationships from their incipiency. There is no support for such a use of the Fourteenth Amendment.

Rather than relying on the disinterested social judgment of professional social workers acting under the aegis of well-conceived tried and tested statutes, the Court's decision embroils the child in legalistic, psychological theorism; leaving the child a pawn in a game from which the child should be spared. No evidence has shown that the present procedures are conducive to or have resulted in hasty or ill-advised separations from the viewpoint of the foster child.

The right of cross-examination and discovery procedures, which would presumably now be afforded to foster parents after one year, have not been shown to be in the best interests of the child.

I do not imply in any wise that a child should not have the right to be heard—to participate. That is not what is at stake. The only question before the Court is whether layers of procedural obstruction should be afforded to

the foster parents to impede judgments reasonably reached by concerned independent disinterested agencies and professionals by less starchy methods. The pre-removal conference and the procedures leading thereto are not in any instance shown to have been defective from the viewpoint of the foster child. It is unrealistic to expect that a pre-teenage child, for example, is to invoke the "hearing" contemplated by the majority decision. And if an appointed adult representative is needed to articulate the interest of the child—the existing procedures accord the needed due process.

The State legislature which spawned the statutory scheme that makes the foster parent-child relationship possible has made the rational decision that until it is 24 months old this relationship can never be sufficiently strong to require pre-termination hearing protection. While not abdicating its constitutional responsibilities or improperly deferring to a state legislature, the Court should not overturn the legislature's decision absent adequate proof that it is irrational or unfair. In short, it can recognize the State legislature's superior fact-finding ability and it can agree with that legislature's decision without avoiding its obligation to determine what does and does not satisfy the Due Process Clause.

The Supreme Court has warned against a return to the days of substantive due process.

> Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. . . . We have returned to the original constitutional proposition that courts do not substitute their social and

economic beliefs for the judgment of legislative bodies, who are elected to pass laws . . . . we refuse to sit as a "super legislature to weigh the wisdom of legislation," [citation omitted] and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." [citation omitted] . . . . The . . . statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State . . . . *Ferguson* v. *Skrupa,* 372 U.S. 726, 729-732 (1963).

This warning applies equally well to the social as to the economic sphere. While (in the first two years of foster parentage) it may conceivably be wiser to hold a pre-termination hearing to hear the parties out, it is not, thereby, constitutionally required. The evidence has not shown that, during those first two years, the foster parents and the foster child are not afforded adequate due process. The choice of providing a pre-termination hearing after one year of foster parentage rather than the two year period now embodied in SSL § 383(3) through the right of intervention, is a choice that seems particularly legislative in character.

I would dismiss the complaint.

s/ MILTON POLLACK

FOOTNOTES

[1] Under Social Services Law § 392 (1976 Supp.) the New York Family Court is required to hold a hearing to review the foster care status of any foster child after 18 months of continuous care in the same foster home and, then, at least every 24 months. The foster parents are made parties "entitled to participate in this proceeding." § 392(4)(1976 Supp.).

[2] The statutes outlined above and under attack here also fairly put the foster parents on notice of the State's right to summarily remove the child from the foster home within 24 months of foster parentage. Of course, the observations in the text above are principally relevant with respect to an assertion of an "entitlement" to the children or the foster parent-child relationship. Such a property-like interest is to be distinguished from an assertion of a "liberty" interest similar to that asserted in *Stanley* v. *Illinois,* 405 U.S. 645 (1972).

[3] The Appellate Division of the Second Department has recently refused to reverse a Trial Term decision ordering two of the plaintiffs in this action to return their foster children to their natural mother. *State of New York ex rel. Wallace* v. *Lhotan et al.,* N.Y.L.J. March 1, 1976, p. 2, col. 1 (2d Dept., Feb. 23, 1976), *affirming,* 48 A. D.2d 665 (Sup. Ct. Nassau Co. 1975). In that decision the Court discussed part of the rationale behind the rejection of the concept of common-law adoption in the case of foster parents.

> . . . . the foster parents must make a serious attempt to encourage, not discourage, the improvement of relations between the children under their charge and a mother who is trying to reestablish the bonds of family love and concern. A portion of the love that foster parents have for the children must be directed towards easing their return to their natural parent. Whatever circumstances will rend the family fabric, it should not be the result of actions of the foster parents, who have taken on their delicate responsibilities on the solemn promise to do otherwise.

So it is that foster parents are charged with the duty to avoid forming the very psychological relationship which they present here as a justification for a pre-removal hearing.

[4] The Supreme Court has frequently expressed the general rule that one person does not have standing to assert the constitutional rights of another. *United States* v. *Raines,* 362 U.S. 17, 21-22 (1960); *Tileston* v. *Ullman,* 318 U.S. 44, 46 (1943). *See generally, Eisenstadt* v. *Baird,* 405 U.S. 438, 443-46 (1972); *Barrows* v.

Jackson, 346 U.S. 249 (1953). In light of the representation of the children by Mrs. Buttenwieser and the Court's holding that an independent representative is required for the foster child at the due process hearing it orders, there can be no grounds for waiving this general rule in this case.

By its appointment of Mrs. Buttenwieser the Court has recognized the *severability* of the claims of foster parents and the foster children. See Rule 17(c), Fed. R. Civ. P.; Wright and Miller, *Federal Practice and Procedure*, § 1570 at 774 (1969). Therefore, the foster parents cannot now be invested with standing as an exception to the *Raines* rule on the grounds that their interests are not severable from those of the children. *See* Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L.J. 599, 606 *et seq.* (1962); Note, *Standing to Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. 423 (1974).

The Court's recognition of some interest in the child other than that asserted by their independent representative herein betrays a significant confusion over the question of when a child does and does not require independent representation under the Due Process Clause. Apparenly a child requires an independent representative in the hearing required by the Court despite the views of the children's independent representative in the hearing of this action.

In short, allowing foster parents standing here to assert the interest of the child seriously undermines the Court's later finding that the child requires representation independent of the foster parents at a due process hearing.

[5] This principle of constitutional jurisprudence is precisely the authority invoked by the Court in its avoidance of the debate surrounding plaintiffs' analogy to *Stanley* v. *Illinois, supra. See generally Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-75 (1947).

[6] *See Bell* v. *Burson*, 402 U.S. 535 (1971); *Richardson* v. *Perales*, 402 U.S. 389 (1971); Note, *Specifying the Procedures Required By Due Process: Toward Limits on the Use of Interest Balancing*, 88 Harv. L. Rev. 1510 (1975).

[7] ". . . . the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. . . . what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. . . . '[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and

circumstances.' It is 'compounded of history, reason, the past course of decisions. . . .'" *Joint Anti-Fascist Comm.* v. *McGrath*, 341 U.S. 123, 162-163 (concurring opinion)." *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886, 894-895 (1961); *Frost* v. *Weinberger*, 515 F.2d 57, 66 (2d Cir. 1975). *See* Friendly, H.J., "*Some Kind of Hearing*", 123 U.Pa. L.Rev. 1267 (1975); Frankel, M. *The Search for Truth: An Umpireal View*, 1031, 1036 (1975).

Appendix "C", Order and Judgment.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2010

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO; and GEORGE and DOROTHY LHOTAN, on their own behalf and as next friend of CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare; ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services, and JOSEPH D'ELIA, individually and as Commissioner of the Nassau County Department of Social Services,

Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated,

Intervenors-Defendants.

This cause having come on to be heard on plaintiffs' application for injunctive and declaratory relief, and this court having held a hearing on March 3, 1975, and briefs

and depositions having been submitted, and a decision having been filed on March 22, 1976, it is hereby

ORDERED and adjudged that:

(1) New York Social Services Law §§ 383(2) and 400, and N.Y.C.R.R. § 450.14 as presently applied are unconstitutional, in violation of the constitutional rights of foster children in the certified class; and

(2) Defendants are permanently enjoined from removing or authorizing the removal of any foster children in the certified class from foster homes in which they have lived continuously for more than one year, without notice and hearing at which the foster parents, the foster child and the biological parents may present any relevant information to the administrative decisionmaker charged with determining the advisability of such removal; and

(3) At hearings such as referred to in the preceding paragraph, defendants shall appoint a disinterested adult to represent the child whenever the defendants, in their informed discretion, determine that the child's age, sophistication and ability effectively to communicate his or her own true feelings warrant such an appointment; and

(4) Said hearings need not be held when the foster child is to be removed pursuant to the order of any court of competent jurisdiction, or at the request of the foster parent; and

(5) Said hearings need not be held in emergency situations when the health or welfare of the foster child is imminently threatened; and

(6) Procedures appropriate to the circumstances, and consistent with the foregoing, shall be promulgated and published by the defendants; and

Appendix "C", Order and Judgment.

(7) The effective date of this order and judgment shall be stayed for 30 days to permit application to a Justice of the Supreme Court of the United States for a further stay pending appeal to the Supreme Court of the United States; and

(8) All motions for rehearing are denied except that the clerk of the district court is directed to strike from the last page of the opinion the words: "Family Court Act § 1021."

Dated: April 14, 1976.

J. Edward Lumbard
J. Edward Lumbard
United States Circuit Judge

Milton Pollack
United States District Judge

Robert L. Carter
Robert L. Carter
United States District Judge

I dissent from the foregoing except paragraphs #7 and #8.

Milton Pollack
United States District Judge

Judgment Entered—4/14/76
Raymond F. Burghardt
Clerk

Appendix "D", Notices of Appeal to the Supreme Court of the United States.

UNITED STATES DISTRICT COURT
Southern District of New York

74 Civ. 2010 (RLC)

(3 Judge Court)

Organization of Foster Families for Equality and Reform, et al.,

Plaintiffs,

against

James E. Dumpson, individually and as Administrator of the New York City Human Resources Administration, et al.,

Defendants.

Sirs:

Notice is hereby given that Bernard Shapiro and Abe Lavine, defendants in the above-captioned matter, hereby appeal to the Supreme Court of the United States from the final order and judgment of the three-judge court entered in this action on April 14, 1976 declaring §§ 383(2) and 400 of the New York Social Services Law and N.Y.C.R.R. § 450.14 unconstitutional as presently applied, and granting permanent injunctive relief, and defendants hereby appeal from each and every part of said order except so much as stays the effective date for 30 days.

Appendix "D", Notice of Appeal to the Supreme Court of the United States.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, New York
June 10, 1976

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
Shapiro and Lavine
By

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By: Elliott Hoffman, Esq.
Assistant Corporation Counsel

Appendix "D", Notice of Appeal to the Supreme Court of the United States.

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Organization of Foster Families
for Equality & Reform;
Madeline Smith, Ralph and Christiane
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on behalf of themselves and all others
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By: James Gallagher, Esq.

Notice of Appeal to the Supreme Court of the United States.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2010 (RLC)
(3 Judge Court)

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, et al.,

Plaintiffs,

against

JAMES E. DUMPSON, individually and as Administrator of the New York City Human Resources Administration, et al.,

Defendants.

SIRS:

NOTICE IS HEREBY GIVEN that Danielle and Eric Gandy, Rafael Serrano and Cheryl, Patricia, Cynthia and Cathleen Wallace, the infant Plaintiffs herein hereby appeal to the Supreme Court of the United States from the final order and judgment of the three-judge court entered in this action on April 14, 1976 declaring §§ 383(2) and 400 of the New York Social Services Law and N.Y.C.R.R. § 450.14 unconstitutional as presently applied, and granting permanent injunctive relief, and plaintiffs hereby appeal from each and every part of said Order except so much as stays the effective date for 30 days.

Notice of Appeal to the Supreme Court of the United States.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, New York
June 11, 1976

Yours, etc.,

HELEN L. BUTTENWIESER
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Notice of Appeal to the Supreme Court of the United States.

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Notice of Appeal.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2010

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO; and GEORGE and DOROTHY LHOTAN, on their own behalf and as next friend of CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE, on behalf of themselves and all others similarly situated,

Plaintiffs,

against

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTERAGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare; ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services, and JOSEPH D'ELIA, individually and as Commissioner of the Nassau County Department of Social Services,

Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated,

Intervenor-Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Naomi Rodriguez, Mary Robins, Dorothy Nelson Shabazz, and Lillian Collazo, Intervenor-Defendants above named, on behalf of themselves and all others similarly situated, appeal to the Supreme Court of the United States from the judgment

and order of the three-judge district Court (Pollack, D.J., dissenting) entered in this class action on April 14, 1976, wherein the district Court declared unconstitutional and enjoined the enforcement of New York Social Services Law Sections 383(2) and 400 and New York Codes Rules and Regulations (N.Y.C.R.R.) 450.14, to the extent said statutes and regulation were applied by Defendants to move children from foster homes in which they had been placed for "a year or more," without affording to the children, in every case, notice and a prior hearing with respect to the propriety of the proposed move.

This appeal is taken pursuant to 28 U.S.C. Section 1253.

Dated: New York, New York
June 10, 1976

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Notice of Appeal to the Supreme Court of the United States.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2010
(R.L.C.)

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO; and GEORGE and DOROTHY LHOTAN, on their own behalf and as next friend of CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE, on behalf of themselves and all others similarly situated,

Plaintiffs,

against

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTERAGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare; ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services, and JOSEPH D'ELIA, individually and as Commissioner of the Nassau County Department of Social Services,

Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated,

Intervenor-Defendants.

SIRS:

NOTICE is hereby given that the defendants James Dumpson, Elizabeth Beine, and Adolin Dall hereby appeal to the Supreme Court of the United States from the order and judgment entered herein in the Office of the Clerk

of the United States District for the Southern District of New York on April 14, 1976 wherein it is adjudged that New York Social Services Law §§ 383 (2) and 400 and N.Y.C.R.R. § 450.14 as presently applied are unconstitutional.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Yours, etc.,

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By .....
CARL SANDERS

June 9, 1976.

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Notice of Appeal to the Supreme Court of the United States.

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Appendix "E", Opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2010

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO; and GEORGE and DOROTHY LHOTAN, on their own behalf and as next friend of CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE, on behalf of themselves and all others similarly situated,

Plaintiffs,

against

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare; ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services, and JOSEPH D'ELIA, individually and as Commissioner of the Nassau County Department of Social Services,

Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situtated,

Intervenor-Defendants.

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By Samuel A. Hirshowitz, Esq.,
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Attorneys for Defendants Bernard Shapiro and Abe Lavine

CARTER, District Judge

OPINION

I

Plaintiff foster parents have moved, pursuant to Rule 23, F.R.Civ.P., to certify as a class all foster parents having a foster child who has lived continuously with them for over one year. Prior to the appointment of separate counsel, plaintiff foster children had moved for certification as a class all foster children who have lived continuously with their foster parents for over one year. In addition, intervenor-defendants have asked the court to certify as a class all natural parents who have voluntarily placed children in foster care. Since each class satisfies the requirements of Rule 23(a) and 23(b)(2), F.R.Civ.P., the motions are granted.

A. *Numerosity (Rule 23(a)(1))*

As of September 30, 1973, there were 32,115 children in foster care with a family in New York State. New York State Department of Social Services, *Social Statistics, A Monthly Summary,* Vol. XXXV, No. 10, (Oct. 1973).[1] The number of children who, at any one time, are with a foster family with whom they have been living continuously for more than one year is fixed, but not easily ascertainable. Plaintiffs estimate that one-half of those children in foster care are so situated. Even if the figure were closer to one-tenth there would be a sufficient number of class members to make joinder impracticable. Likewise, however one estimates the number of foster parents with whom these children have been living, the total seems bound to satisfy the numerosity requirement. Indeed, the standard under Rule 23(a)(1) is the impracticability of joinder, *see generally* 7 Wright & Miller, *Federal Practice and Procedure* § 1762 (1972), and the difficulty of identifying class members is a factor the court may consider, along with numerosity, in determining the feasibility of joining all parties. *Poe* v. *Menghini,* 339 F. Supp. 986, 990 (D. Kan. 1972); *see Yaffe* v. *Powers,* 454 F. 2d 1362, 1366 (1st Cir. 1972). While normally greater exactness in the computation of the size of a class should be demanded of a party, *Demarco* v. *Edens,* 390 F. 2d 836, 845 (2d Cir. 1968), in this case there can be no doubt that the two groups are sufficiently large. It is also unlikely that either class is too large to be maintainable, *see e.g., Almenares* v. *Wyman,* 334 F. Supp. 512, 518 (S.D.N.Y.), *modified on other grounds,* 453 F. 2d 1075 (2d Cir. 1971), *cert. denied,* 405 U.S. 944 (1972), especially since there is no claim for damages.

[1] Recent data shows that this figure has remained fairly constant. As of July 1975, 31,224 children were so situated. New York State Department of Social Services, *Social Statistics, A Monthly Summary,* Vol. XXXVII, No. 8 (Aug. 1975).

Intervenors estimate that at least 7,800 parents have signed voluntary release forms placing their children in foster care. While their method of computation seems no more exact than that of plaintiffs, it is not challenged by any other party. And once again, the size of the foster care system makes it unquestionable that it affects many people in the ways challenged in this suit.

B. *Common Question of Law or Fact (Rule 23(a)(2))*

The challenged statutes and regulations are of statewide application. The procedures have been altered in New York City, but that action was taken under the authority of the existing statute and regulations which continue to have force throughout the state and the abandoned procedures could easily be reinstated.[2]

There can be no doubt that each member of each class faces a question of law identical to that faced by every other member of the class. If the statutory or revised New York City procedures are constitutionally deficient, as plaintiff foster parents assert, the defects strike all equally. Class action status is frequently deemed appropriate in cases such as this challenging the propriety of state or federal law. *See, e.g., Frost* v. *Weinberger,* 375 F. Supp. 1312, 1317 (E.D.N.Y. 1974), *rev'd on other*

[2] Alternatively, since plaintiffs contend that the revised New York City procedures are inadequate under Fourteenth Amendment strictures as well, each proposed class could be viewed as composed of two subclasses—those subject to the revised New York City procedures, and those living in the remainder of the state. *See* Rule 23(c)(4), F.R.Civ.P. However, since the interests of these groups are not antagonistic, Wetzel v. Liberty Mutual Insurance Co., 508 F. 2d 239, 247-48 (3d Cir), *cert. denied,* 421 U.S. 1011 (1975), and since only one statutory scheme is challenged, Wolfson v. Solomon, 54 F.R.D. 584, 588 (S.D.N.Y. 1972), there is no need to certify subclasses.

grounds, 515 F. 2d 57 (2d Cir. 1975); *United States ex rel. Walker* v. *Mancusi,* 338 F. Supp. 311, 315-16 (W.D.N.Y. 1971), *aff'd on other grounds,* 467 F. 2d 51 (2d Cir. 1972).

C. Representative Parties' Claims or Defenses Typical of the Claims or Defenses of the Class (Rule 23 (a)(3))

As described in Judge Lumbard's opinion on the merits filed today, the foster parents who would represent a class all fear, with varying degrees of immediacy, the removal without prior hearings of foster children who have lived with them continuously for more than one year. The named children face the possibility of being moved without the procedural protections to which they may be entitled. The intervenors all have children currently in the foster care system. They all voice a concern that any changes in the present system will adversely affect them in ways that would be the same for all other parents who have voluntarily placed children in foster care. They are all, therefore, typical of the classes they seek to represent. *Kohn* v. *Royall, Koegel & Wells,* 59 F.R.D. 515, 521 (S.D.N.Y. 1973), *appeal dismissed,* 496 F. 2d 1094 (2d Cir. 1974).

D. Fair and Adequate Protection of the Class' Interests (Rule 23(a) (4))

Counsel for each of the representative parties have assiduously advocated the rights of those before the court and of the class members not present. I would particularly like to thank court-appointed counsel, Helen Buttenwieser, for undertaking the burden assigned to her and for a well conceived and helpful presentation of her understanding of the scope and reach of the rights of foster children.

E. Action or Inaction on Grounds Generally Applicable to Class—Appropriateness of Injunctive or Declaratory Relief (Rule 23 (b)(2))

Plaintiff foster parents have asked for declaratory and injunctive relief that would establish for them certain procedural safeguards before a foster child can be removed from their care. Both counsel for the foster children, and counsel for intervenors have opposed this relief. No damages are sought. This situation is ideally suited for class action treatment under subdivision (b)(2) of Rule 23, F.R.Civ.P., since the decision of the court will have a similar impact on broad groups of people. In fact, this is the kind of situation envisioned by the drafters of Rule 23. *See Advisory Committee Notes to Rule 23, F.R.Civ.P.* and cases cited therein; *Escalera* v. *New York City Housing Authority,* 425 F. 2d 853, 867 (2d Cir.), *cert. denied,* 400 U.S. 853 (1970); *Agron* v. *Montanye,* 392 F. Supp. 454, 455 (W.D.N.Y. 1975); *Lynch* v. *Baxley,* 386 F. Supp. 378, 386-87 (M.D. Ala. 1974). Since class action treatment is so clearly appropriate under subdivision (b)(2), I do not need to consider whether any of these classes might also be proper under (b)(1).

F. Notice

There has been no opportunity for notice to the class, but that is immaterial since notice is no longer required in 23(b)(2) class actions in this circuit, *Frost* v. *Weinberger, supra,* 515 F. 2d at 64-65; and in a case such as this, where the court is in a position to determine that the various arguments of the classes have been effectively presented, notice is not needed. *Wetzel* v. *Liberty Mutual Insurance Co., supra,* 508 F. 2d at 254-57; *Baxter* v. *Savannah Sugar Refining Corp.,* 350 F. Supp. 139, 141 (S.D. Ga.

1972), *aff'd in part, rev'd in part on other grounds and remanded,* 495 F. 2d 437 (5th Cir.), *cert. denied,* 419 U.S. 1033 (1974); *Citizens Environmental Council* v. *Volpe,* 364 F. Supp. 286, 288 (D. Kan.), *aff'd,* 484 F. 2d 870 (10th Cir. 1973). All three classes, therefore, are appropriate for class certification.

II.

Intervenor-defendants have moved pursuant to Rule 15, F.R.Civ.P., to amend their complaint, and also ask under Rule 21, F.R.Civ.P., to be allowed to join an additional party.

The motion to amend is granted and the proposed amended intervenor-complaint is accepted, including the first thirteen affirmative defenses, but not including affirmative defenses 14 and 15, or the proposed cross-claim. In a previous order, intervenors were given permission to assert the rights of the natural parents of children in foster care, but only in respect of those issues raised in plaintiffs' second amended complaint. Order of August 15, 1974. Intervenors' affirmative defenses 1-13 are genuinely responsive to plaintiffs' lawsuit and should be considered as part of this case. Affirmative defenses 14 and 15 raise issues similar to those rejected in the order of August 15, 1974 as likely to expand the scope of the lawsuit. For example, intervenors assert that, for a number of reasons, natural parents do not give informed consent when they place children in the foster care system.

Likewise, intervenors' proposed cross-claim seeks to expand the issues of this lawsuit. As is amply demonstrated by the allegations in the cross-claim, intervenors again seek to raise questions concerning the placement of children in foster care, and the relationship between natural parents and the foster care system. Intervenors have not narrowed

their cross-claim to deal with the rights of natural parents, if any, that are or might be infringed were the three-judge court to grant increased procedural rights to plaintiff foster parents or foster children.

Intervenors move that Lillian Collazo be joined as an additional party. That motion is granted. Ms. Collazo is the natural parent of a child in the foster care system. She has a legitimate concern with the procedures that guide that system, and therefore the questions of law raised in this case apply to her as well as to the other intervenor-defendants. Rule 20(a), F.R.Civ.P.

In sum, the motions to certify a class of plaintiff foster parents, plaintiff foster children, and intervenor-defendant natural parents are granted. Intervenors' motion to amend their complaint is granted except for affirmative defenses 14 and 15 and the cross-claim, which are not allowed; and intervenors' motion to join an additional party is granted.

So Ordered.

Dated: New York, New York
March 22, 1976

Robert L. Carter
Robert L. Carter
U. S. D. J.

Appendix "F", New York Law and Regulations.

New York Social Services Law

§ 383

2. The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision, in the authorized agency placing out or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded.

§ 400. Removal of children

1. When any child shall have been placed in an institution or in a family home by a commissioner of public welfare or a city public welfare officer, the commissioner or city public welfare officer may remove such child from such institution or family home and make such disposition of such child as is provided by law.

2. Any person aggrieved by such decision of the commissioner of public welfare or city welfare officer may appeal to the department, which upon receipt of the appeal shall review the case, shall give the person making the appeal an opportunity for a fair hearing thereon and within thirty days render its decision. The department may also, on its own motions, review any such decision made by the public welfare official. The department may make such additional investigation as it may deem necessary. All decisions of the department shall be binding upon the public welfare district involved and shall be complied with by the public welfare officials thereof.

18 New York Code Rules and Regulations

§ 450.10 Removal from foster family care. (a) Whenever a social services official of another authorized agency

acting on his behalf proposes to remove a child in foster family care from the foster family home, he or such other authorized agency, as may be appropriate, shall notify the foster family parents, in writing of the intention to remove such child at least 10 days prior to the proposed effective date of such removal, except where the health or safety of the child requires that he be removed immediately from the foster family home. Such notification shall further advise the foster family parents that they may request a conference with the social services official or a designated employee of his social services department at which time they may appear, with or without a representative to have the proposed action reviewed, be advised of the reasons therefor and be afforded an opportunity to submit reasons why the child should not be removed. Each social services official shall instruct and require any authorized agency acting on his behalf to furnish notice in accordance with the provisions of this section. Foster parents who do not object to the removal of the child from their home may waive in writing their right to the 10 day notice, provided, however, that such waiver shall not be executed prior to the social services official's determination to remove the child from the foster home and notifying the foster parents thereof.

(b) Upon the receipt of a request for such conference, the social services official shall set a time and place for such conference to be held within 10 days of receipt of such request and shall send written notice of such conference to the foster family parents and their representative, if any, and to the authorized agency, if any, at least five days prior to the date of such conference.

(c) The social services official shall render and issue his decision as expeditiously as possible but not later than five days after the conference and shall send a written

notice of his decision to the foster family parents and their representative, if any, and to the authorized agency, if any. Such decision shall advise the foster family parents of their right to appeal to the department and request a fair hearing in accordance with section 400 of the Social Services Law.

(d) In the event there is a request for a conference, the child shall not be removed from the foster family home until at least three days after the notice of decision is sent, or prior to the proposed effective date of removal, whichever occurs later.

(e) In any agreement for foster care between a social services official or another authorized agency acting on his behalf and foster parents, there shall be contained therein a statement of a foster parent's rights provided under this section.

Appendix "G", Opinion.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2010

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO, on behalf of themselves and all others similarly situated,

Plaintiffs,

—against—

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK,

Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; and DOROTHY NELSON SHABAZZ, on behalf of themselves and all others similarly situated,

Intervenor-Defendants.

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Organization of Foster Families for
Equality and Reform
Madeline Smith
Ralph and Christiane Goldberg,
on behalf of themselves and all
others similarly situated

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OPINION

The Decision to Appoint Separate Counsel for the Children

Plaintiffs brought this class action pursuant to 42 U.S.C. § 1983 seeking a declaration that Sections 383(2) and 400 of the New York Social Services Law and 18 N.Y.C.R.R. 450.14 violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution. The complaint also requests that a three-judge court be convened pursuant to 28 U.S.C. §§ 2281 and 2284 and that the defendant agencies and officers be enjoined from enforcing the statutes and regulation. The three-judge court was appointed by an order dated June 27, 1974.

Plaintiffs Madeline Smith and Ralph and Christiane Goldberg are foster parents who have taken children into their homes and cared for them under the program provided by the New York Social Services Law. The complaint alleges that Mrs. Smith and the Goldbergs are members of two sub-classes which together are comprised of over one thousand foster parents who have cared for foster children continuously for more than one year. (Second Amended Complaint, Paragraph 6 (hereinafter "Complaint")). Pursuant to Rule 23(a) (3), it is alleged that the claims of these plaintiffs are typical of the claims of all foster parents "who are in jeopardy of having [foster] children summarily removed pursuant to • • • New York Social Services Law §§ 383(2) and 400, and 18

NYCRR 450.14, which violate their constitutional rights to due process and [e]qual protection of the law." (Complaint, Paragraph 8).

Plaintiffs Danielle and Eric Gandy, who are six and nine years old respectively, are the foster children of Mrs. Smith. Rafael Serrano, eleven years old, is the foster child of the Goldbergs. These children, who appear by their foster parents as next friends, claim to represent a sub-class of over one thousand foster children who have been in the same foster homes for more than one year. (Complaint, Paragraph 7). It is alleged that their claims are typical of those of foster children "who have been placed in stable, loving foster homes, and who are in jeopardy of losing what has become their family through the arbitrary, standardless procedures authorized by [the statutes and regulation here challenged]." (Complaint, Paragraph 10).

The same counsel from the New York Civil Liberties Union originally represented both the named foster parents and their class and the named foster children and their class. Furthermore, the Civil Liberties Union counsel proceeded on behalf of both groups with a single set of pleadings.

The question of a possible conflict of interest between the foster parents and the children was raised in a hearing before this court on August 5, 1974. After consulting with my two colleagues on the three-judge court, I decided that in view of the potential conflict, separate counsel should be appointed for the children. On October 25, 1974, counsel for all parties were convened and informed of my decision and of my tentative choice of Helen L. Buttenwieser, Esq., to represent the children. At the meeting of counsel, Marcia R. Lowry, Esq., of the Civil Liberties Union first informed me that if she were required to choose between the foster parents and the children, she would prefer to con-

tinue to represent the children. She stated that she had made a personal commitment to the named children to represent them and that the foster parents had, from the outset, expressed their willingness to obtain separate counsel for themselves should a conflict arise. I indicated at that time that I thought that the decision to appoint independent counsel for the *children* was correct. My selection of Ms. Buttenwieser was confirmed by letter to all counsel on October 29, 1974.

The Civil Liberties Union brought on the instant motions by an order to show cause dated November 7, and oral argument was heard on November 15. The Civil Liberties Union lawyers seek an order pursuant to Rule 17(c), F.R.Civ.P., continuing the Civil Liberties Union as counsel to the foster children and requiring the foster parents to secure substitute counsel. In the alternative, the Civil Liberties Union counsel move for an order pursuant to Rule 17(c) appointing Dr. Kenneth Clark as guardian *ad litem* to the children. Both motions are denied.

The Pleadings Filed by the Civil Liberties Union Necessitated the Appointment of Separate Counsel for the Children

The primary reason for the original decision to appoint separate counsel for the children was the court's concern over the potential conflict of interest between the foster parents and the children.

The decision to replace the Civil Liberties Union as counsel for the children, rather than require the foster parents to obtain separate counsel, was based on the court's determination that the Civil Liberties Union could not adequately protect the interests of the children under the pleadings it had filed. Upon examination of the pleadings, the court was most concerned that all of the allega-

tions of the complaint were based on the uncritical assumption that the rights and interests of the children are identical to those of the foster parents. After claiming that each of the challenged procedures violated a particular right of the foster parents, the complaint alleged that the procedure violated precisely the same right of the foster children. The complaint made no mention whatever of possible interests of the children which might be adverse to those of the foster parents.

It appeared to the court that the effect of these pleadings was to align the children squarely with the foster parents. If the Civil Liberties Union were to proceed on behalf of the children under pleadings which assumed that the interests of the children and the foster parents were identical, the result would be to foreclose litigation of any dispute between the children and the foster parents. Accordingly, it seemed essential that separate counsel be obtained for the children, rather than for the foster parents, and that the substitute counsel for the children file a fresh set of pleadings.

The complaint alleges that one of the defendant agencies arbitrarily decided to remove the children, Eric and Danielle Gandy, from plaintiff Madeline Smith's home, and that although Mrs. Smith was notified of the agency's decision, she was not informed of the reasons therefor. Plaintiffs also claim that since the administrative conference procedure offered to Mrs. Smith under 18 N.Y.C.R.R. 450.14 is not regulated by written standards, it did not satisfy due process. (Complaint, Paragraphs 22-41)

The complaint also alleges that another of the defendant agencies plans to remove Rafael Serrano from the Goldbergs' home according to the same procedure. (Complaint, Paragraphs 42-57)

Plaintiffs claim further that the notification and administrative conference procedures violate the rights of Mrs. Smith, the Goldbergs and members of their class not to be

deprived without due process of the "fundamental right to establish a home and bring up children" and of their rights under the Fourteenth Amendment generally. (Complaint, Paragraphs 59-61)

The paragraphs that follow allege violations of the foster parents' and the children's rights in practically identical terms. With respect to the foster parents, it is alleged that § 383(2) is "unconstitutionally vague" and violates their "fundamental rights to establish a home, bring up children and to enjoy those privileges long recognized as essential to the pursuit of happiness and liberty encompassed within the due process guarantee of the Fourteenth Amendment." (Complaint, Paragraph 63) The allegations on behalf of the foster children respecting § 383(2) are identical in substance and in language, except that the references to establishing a home and bringing up children have been deleted. (Complaint, Paragraph 64) In identical language, it is alleged that § 400 of the Social Services Law violates the constitutional rights of foster parents and children. (Complaint, Paragraphs 66 and 67)[1]

The balance of the allegations in the complaint also assume that the rights and interests of the foster parents and the children are identical. Thus it is alleged that the absence of regulations interpreting §§ 383(2) and 400, the administrative conference procedure, and the "internal procedure" adopted by defendant Dumpson and his agents in June of 1974, violate the constitutional rights of all "plaintiffs and members of their class." (Complaint, Paragraphs 68, 72 and 73) The complaint claims further that the discretion given to private child-care agencies and the absence of any provision for a post-removal hearing for foster parents under the supervision of such private agencies deprive "plaintiffs Madeline Smith and Eric and Danielle

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[1] Paragraph 64 refers only to Rafael Serrano, while Paragraph 67 refers to all three named children.

Gandy and members of their class" of their rights under the Due Process and Equal Protection Clauses. (Complaint, Paragraphs 69 and 70) Two paragraphs allege in identical language that the absence of a prior hearing violates the Fourteenth Amendment rights of the named children and members of their class and the named foster parents and members of their class respectively. (Complaint, Paragraphs 76 and 77)

In addition to declaratory relief, the complaint requests that the defendants be enjoined from removing children who have lived with foster parents for more than one year without the "due process safeguards of adequate and specific notice and a prior hearing."

The Decision to Appoint Separate Counsel Reaffimed

The Civil Liberties Union requests that the court reverse its appointment of Ms. Buttenwieser as counsel for the children and reinstate the Civil Liberties Union.

Under Rule 17(c), the court is authorized and directed to make "such • • • order as it deems proper for the protection" of the foster children.[2] The court made the required determination as to the best means of protecting the children when it made the initial decision to appoint Ms. Buttenwieser as separate counsel. On this motion under Rule 17(c), it has re-examined its conclusion. As set forth more fully below, the court remains convinced that

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[2] The full text of the third sentence of Rule 17(c) is as follows:

"The court shall appoint a guardian *ad litem* for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person."

The fact that the children were already represented at the time of Ms. Buttenwieser's appointment did not preclude this court from making the appointment. *See Zaro* v. *Strauss*, 167 F. 2d 218, 220 (5th Cir. 1948) (appointment of guardian *ad litem*); 6 C. Wright and A. Miller, *Federal Practice and Procedure*, § 1570, (1972 ed.).

there exists a potential conflict of interest between the foster parents and the children, and that the Civil Liberties Union cannot adequately protect the interests of the children under the pleadings it has filed.

In addition to its duty under Rule 17(c), since this is a class action, the court is subject to a duty under Rule 23(a) (4) to insure that plaintiffs will "fairly and adequately protect the interests of the class" of foster children. The determination required by Rule 23(a) (4) is left to the discretion of the trial court, *Mersay* v. *First Republic Corp. of America*, 43 F.R.D. 465, 470 (S.D.N.Y. 1968), and an appellate court will not reverse the lower court's determination "in the absence of improvident action." *Pelelas* v. *Caterpillar Tractor Co.*, 113 F. 2d 629, 633 (7th Cir. 1940), *cert. denied*, 311 U.S. 700 (1940).

Rule 23(a) (4) requires, *inter alia*, that the court assure itself that counsel for the representative parties will prosecute the action vigorously on behalf of the class. *See Herbst* v. *Able*, 47 F.R.D. 11, 15 (S.D.N.Y. 1969); *Fogel* v. *Wolfgang*, 47 F.R.D. 213, 216 (S.D.N.Y. 1969).

Ordinarily this issue would be resolved as a part of the court's decision on plaintiffs' pending motion for a class action determination. However, the issue of the children's counsel should be settled prior to the hearing before the three-judge court on the class action and other motions so that the children may be fully represented at that hearing. In *Doe* v. *Norton*, 365 F. Supp. 65, 69 (D. Conn. 1973), the plaintiff unwed mothers and illegitimate children challenged the constitutionality of certain Connecticut welfare legislation before a three-judge court. Prior to the decision on the class action motion by the three-judge court, Judge Blumenfeld considered such class action questions as typicality and adequate representation, and, on his own motion, appointed separate counsel for the children. His decision was based on a finding that "some of the interests which the mothers urge relating to the

subject matter of this action are neither typical of nor congruent with the interests of their children, but actually conflict with them in several respects." 365 F. Supp. at 69.

For similar reasons, I have decided to deny the motion of the Civil Liberties Union in the instant case, and, pursuant to my power under Rules 17(c) and 24(a)(4), I reaffirm the appointment of Ms. Buttenwieser as independent counsel to the children.

The case is of vital importance to the well-being of more than one thousand children. In the course of this litigation, it is essential that the court make a thorough and searching examination of the interests of the natural parents, foster parents, the children and the public. The interests of all parties other than the children are well represented by counsel in this proceeding. Therefore, the court must look to and rely heavily on the children's counsel to articulate and define their interests. The children's counsel must advocate the rights of the children and the children alone, vigorously, independently, and without regard to the interests of any other party to the action.

After re-examining the complaint, the court remains convinced that its primary objective is to secure the foster parents' claimed "fundamental rights to establish a home and bring up children." The result is that the interests of the children are asserted only insofar as they coincide with the foster parents' interests.

The complaint and motion papers filed by the Civil Liberties Union fail to give proper consideration to several possible conflicting interests of the children which have been suggested by other parties to this litigation. For example, it has been suggested that the notice and hearing procedures proposed by the plaintiffs may prevent the expeditious removal of a child in an emergency situation where the foster parents are unfit to care for the child. The court must consider the situation where it is in the interest of the child to leave the foster home as quickly

as possible to return to his natural parents or to take advantage of a scarce place in a special school. The attachment of the foster children to their natural parents should be considered. Finally, the court must assess the possibility that a child's needs and desires may be determined more effectively through examination by the trained personnel provided by state social welfare agencies than through an adversary hearing.

Considerations such as these have hitherto been advanced by one or another of the defendants, who, like the foster parents, have some interest of their own to advance simultaneously. It is my view that there must be independent counsel whose sole commitment is to the children, and who is therefore free to advocate their interests vigorously even though they may conflict with the interests of some other party to this litigation.

The Civil Liberties Union continues to adhere to its position that there is no conflict between the interests of the foster parents and those of the children. (Memorandum of Civil Liberties Union, Page 1.)

In view of the insistence by the Civil Liberties Union in its pleadings and on this motion that the children should be aligned with the foster parents, and its attempt to foreclose the litigation of any dispute between the children and the foster parents, the court believes that the Civil Liberties Union cannot provide effective assistance to the court in defining, articulating and exploring those interests of the children which are potentially adverse to those of the foster parents.

Ms. Lowry of the Civil Liberties Union once more directs our attention to her personal commitment to represent the named children, and, in the event of a conflict, to require the foster *parents* to obtain separate counsel.

I am not disposed to lend much weight to this commitment, for Ms. Lowry has undertaken to represent not only the named children, but an entire class of more than 1,000

foster children who had no voice in retaining the Civil Liberties Union in the first instance. It is the responsibility of the court to insure that the class is represented by counsel who will consider and advocate the needs and desires of children in a wide variety of circumstances, some of which may differ greatly from those of the three named children.

Furthermore, it is most doubtful that the named children, who are six, nine and eleven years old, can make an informed choice of counsel to represent their own interests. (See Affidavit of Helen L. Buttenwieser, Paragraph 5) I think that I am justified in attaching no weight whatever to the named children's choice as it affects the representation of the other children in the class.

The Civil Liberties Union has chosen a uniquely inopportune time to submit affidavits of foster *parents* averring that the foster children wish Ms. Lowry to continue to represent them. The submission of these affidavits attests the Civil Liberties Union's apparent inability to appreciate, much less to share, this court's concern over a potential conflict of interest between the foster parents and the children.

The Civil Liberties Union correctly states that this court has not found that the Civil Liberties Union has violated the Code of Professional Responsibility.[3] However, the Civil Liberties Union argues further that in the absence of such a finding, the court may not provide substitute counsel for the class of children.

I disagree. As stated above, Rules 17(c) and 23(a)(4) provide ample authority for the appointment of separate counsel upon a determination that such appointment is necessary to insure adequate representation of the class of children. *See Doe* v. *Norton,* 365 F. Supp. 65 (D. Conn.

[3] There has been no suggestion that the Civil Liberties Union counsel have not discharged their duties according to the highest standards of our profession.

1973). The latter determination does not require a finding that the original counsel to the children have violated professional ethics.

The Civil Liberties Union also charges that Ms. Buttenwieser cannot provide independent representation for the children in view of her past representation of child-care agencies which place foster children. I do not, however, believe that the fact that Ms. Buttenwieser previously represented organizations that might have some interest in this litigation is, in itself,[4] of any consequence.

In addition, on oral argument, the Civil Liberties Union contended that in view of the position taken by Ms. Buttenwieser in her answer filed on November 13, the court's reaffirmation of her appointment on this motion is tantamount to a determination on the merits. It should be noted, however, that when the court first appointed Ms. Buttenwieser in October, it had no inkling whatever of the position she would take on the issues in this case. Thus her selection was in no way influenced by a consideration of the merits.

Furthermore, although Ms. Buttenwieser ultimately did take a position on the issues in the case, the court has every reason to believe that she did so upon consideration of the interests of the children alone, and without regard to the interests of any other party to this litigation.

I disagree with the Civil Liberties Union's contention that a full evidentiary hearing should have been held before the appointment of separate counsel for the children. In each of the cases cited by the Civil Liberties Union, one party sought to disqualify counsel for the opposing party, charging serious violations of professional ethics. *E.g., Laskey Bros.* v. *Warner Bros. Pictures,* 224 F. 2d 824 (2d Cir. 1954); *Consolidated Theatres* v. *Management Corp.,*

[4] There is, of course, no suggestion of any unauthorized use of confidential information obtained in representing a former client.

216 F. 2d 920, 921-22 (2d Cir. 1954). As noted, the instant case does not involve charges of ethical violations, and the court has acted *on its own motion* on behalf of the children in retaining counsel for them. The court's action is similar to that of a party in retaining counsel on his own behalf, and that is not usually the occasion for an evidentiary hearing. Furthermore, Rule 17(c) does not require such a hearing when the court appoints counsel for an infant. Moreover, since a court may determine the competence of counsel, as required by Rule 23 (a)(4), without an evidentiary hearing, solely on the basis of the pleadings, *Rosenblatt* v. *Omega Equities Corp.,* 50 F.R.D. 61, 64 (S.D.N.Y. 1970), a court should be able to determine on the basis of the pleadings alone whether a potential conflict may exist and whether counsel for the class may not be willing to press all possible claims of the class.

Finally, it is to be noted that, contrary to the implication of the Civil Liberties Union's memorandum, this court has given the Civil Liberties Union an adequate opportunity to be heard on the issue of counsel, including an informal conference and full oral argument on the instant motion.

The Civil Liberties Union also contends that the court's action in replacing it by independent counsel for the children deprives the children of the right to appear by counsel of their own choice, a right which was extended to minor children by *Application of Gault,* 387 U.S. 1 (1967).

Gault seems to bear only a remote relation to the issues on this motion since it concerns the right of a single 15-year old minor and his parent to have the assistance of counsel in a juvenile delinquency proceeding which was "comparable in seriousness to a felony prosecution." 387 U.S. at 36. Furthermore, this court has obviously not deprived the class of children of counsel altogether. Indeed, in appointing separate counsel, the court has attempted to vindicate the right of the entire class of children to effective, disinterested counsel. As to the named children's right to choose their own counsel, this right is necessarily subject to some limitation where the named parties seek to pursue their interests through a class adjudication which will bind over a thousand other persons who had no part in the original selection of counsel.

Motion for Appointment of Guardian Ad Litem

The Civil Liberties Union moves in the alternative for the appointment of Dr. Kenneth Clark as guardian *ad litem* to the children, pursuant to Rule 17(c). It is proposed that Dr. Clark be permitted to make an independent evaluation of the issues in the case and appoint counsel who, in his judgment, will best protect the interests of the children.

Rule 23 imposes a duty on the *court* to assure that a class is adequately represented by counsel, and Rule 17(c) requires the *court* to make provision for the protection of an infant.[5] This court has discharged those duties by appointing Ms. Buttenwieser as counsel, and it refuses to shift its responsibilities to a guardian *ad litem.*

Thus the motion for the appointment of a guardian *ad litem* is also denied.

So Ordered.

Dated: New York, New York
December 10, 1974

Robert L. Carter
Robert L. Carter
U.S.D.J.

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[5] Rule 17(c) does not require the appointment of a guardian *ad litem,* but authorizes the court to make any other order which it "deems necessary for the protection" of the foster children.

Appendix "H", Answer.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2010 RLC

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO, on behalf of themselves and all others similarly situated,

Plaintiffs,

—against—

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS OF THE BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK,

Defendants.

The children DANIELLE and ERIC GANDY, and RAFAEL SERRANO, and all other children similarly situated, by their attorney HELEN L. BUTTENWIESER, for their answer to the second amended complaint herein:

FOR A FIRST DEFENSE

1. Denies the allegations of paragraphs 5, 9, 10, 11, 59, 60, 61, 63, 64, 66, 67, 68, 69, 70, 71, 72, 73, 75, 76 and 77 of the second amended complaint.

Appendix "H", Answer.

2. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 6, 7, 8, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 57 and 58 of the second amended complaint.

3. Lacks information sufficient to form a belief as to the allegations of paragraph 38 of the second amended complaint except admits that the Catholic Guardian Society of New York is a child-care agency authorized, approved and regulated by the State of New York and supervised by state and city officials.

FOR A SECOND DEFENSE

4. The Court lacks jurisdiction of the subject matter.

FOR A THIRD DEFENSE

5. The second amended complaint fails to state a claim upon which relief can be granted.

FOR A FOURTH DEFENSE

6. The Plaintiffs have neither legal capacity nor standing to maintain this action, in that the rights sought to be protected are those belonging to the children and not to the Plaintiffs.

FOR A FIFTH DEFENSE

7. Deny that the persons whom the Plaintiffs purport to represent as a class are properly and fairly represented by the Plaintiffs.

8. The interests of the children whom Plaintiffs purport to represent, would be vitally and adversely affected

by the granting of the relief prayed for in the second amended complaint.

FOR A SIXTH DEFENSE

9. Plaintiffs have failed to exhaust their administrative remedies.

WHEREFORE, it is respectfully prayed that judgment be entered dismissing the second amended complaint and granting such other relief as to the Court seems just and proper.

Dated: New York, New York
November 8, 1974

Helen L. Buttenwieser
HELEN L. BUTTENWIESER
Attorney for the children,
Daniell and Eric Gandy and
Rafael Serrano, and all other
children similarly situated
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